Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

STATE OF TEXAS AND
THE GOVERNOR OF THE STATE OF TEXAS
Cross-Petitioners

v.

YSLETA DEL SUR PUEBLO,
Cross-Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Fifth Circuit should have reached the question of whether Congress had the power under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* (1994) (IGRA) to abrogate the State's Eleventh Amendment immunity and should have decided that it did not.

II. If the Fifth Circuit found that Congress had the authority under IGRA to abrogate the Eleventh Amendment immunity of the State, it should have decided that the Tribe's Restoration Act, 25 U.S.C.A. § 1300g (West Supp. 1994), can be reconciled with IGRA by allowing the Restoration Act to dictate the scope of Class III gaming available to the Tribe while finding that IGRA dictates the procedure for regulating such gaming.

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II. IF THE FIFTH CIRCUIT FOUND THAT CONGRESS HAD THE AUTHORITY UNDER IGRA TO ABROGATE THE ELEVENTH AMENDMENT IMMUNITY OF THE STATE, IT SHOULD HAVE DECIDED THAT THE TRIBE'S RESTORATION ACT CAN BE RECONCILED WITH IGRA BY ALLOWING THE RESTORATION ACT TO DICTATE THE SCOPE OF CLASS III GAMING AVAILABLE TO THE TRIBE WHILE FINDING THAT IGRA DICTATES THE PROCEDURE FOR REGULATING SUCH GAMING 7

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At the Fifth Circuit Court of Appeals, the State argued that the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21, violated the Eleventh Amendment to the extent that it allowed an Indian tribe to sue a state and that it violated the Tenth Amendment to the extent it coerced the state to negotiate a compact in the face of federal court action.[1]

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[1] These questions have previously been presented to this Court in Petitions for Writ of Certiorari: *Poarch Band of Creek Indians v. State of Alabama*, U.S. Supreme Court No. 94-34 (petition for certiorari); *State of Florida v. Seminole Tribe of Florida*, U.S. Supreme Court No. 94-219 (petition for certiorari); *State of Washington v. The Spokane Tribe of Indians*, U.S. Supreme Court No. 94-357 (petition for certiorari); and *State of Oklahoma v. Ponca Tribe of Oklahoma*, U.S. Supreme Court No. 94-1029 (petition for certiorari).

Additionally, the State argued that, if Congress had the power to waive the state's Eleventh Amendment immunity to allow Indian tribes to sue states as it attempted to do in IGRA, Texas was not required to negotiate casino gambling because casino gambling was not permitted for any purpose by any person, organization or entity in Texas, and it was against the public policy of Texas. Texas argued that any ambiguity that courts had found in the language of IGRA which allowed tribes to pursue any form of Class III gaming if some form of Class III gaming, like a state lottery, was allowed in the state, could not operate in favor of the Ysleta del Sur Pueblo because their Restoration Act, 25 U.S.C. §§ 1300g *et seq.*, provided that "all gaming activities which are prohibited by the laws of the state of Texas are hereby prohibited on the reservation and on the lands of the tribe." 25 U.S.C. § 1300g-6(a). The State argued that the Restoration Act and IGRA should be harmonized by allowing IGRA to govern the procedures by which the Ysleta del Sur Pueblo could pursue gaming, while allowing the Restoration Act to govern the substantive question regarding which gaming activities were allowed.[2]

The Tribe sued the state of Texas pursuant to IGRA, 25 U.S.C. § 2710(d)(7)(A)(i).

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 36 F.3d 1325 (5th Cir. 1994). Appendix of Petitioner Tribe in No. 94-1161 at 1a to 21a. The district court's order granting summary judgment for the Ysleta de Sur Pueblo is reported at 852 F.Supp. 587 (W.D. Tex. 1993). Appendix of Petitioner Tribe at 22a to 43a. The order of the United States District Court for the Western District of Texas denying the State of Texas' motion to dismiss is not reported. Appendix of Petitioner Tribe at 44a.

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[2] The Tribe's version of harmonizing does not give meaning to the provisions of each Act, but reduces the Restoration Act to the mirror image of IGRA.

STATEMENT OF THE JURISDICTION

The opinion of the Fifth Circuit was entered on October 24, 1994. The Tribe's Petition for Rehearing was denied on November 21, 1994. The Ysleta del Sur Pueblo filed its Petition for Writ of Certiorari on December 30, 1994. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are numerous lengthy constitutional and statutory provisions involved in this case. They are listed here and set forth in their entirety at 45a to 60a in the Petitioner Tribe's Appendix: U.S. Const. art. I, § 8, cl.3; U.S. Const. amend. XI; 18 U.S.C. § 1166; 25 U.S.C. § 1300g-2(a)-(c), -4(a) and (f), -6; 25 U.S.C. § 2701-2703(5), (6), (7)(A)(B) and (8), 2710(d)(1); and Pub. L. 90-287, 82 Stat. 93 (1968). Texas Penal Code Ann. § 47.02(c)(1) (Vernon 1994) is set forth in the Appendix to this cross-petition.

STATEMENT OF THE CASE

This case was brought pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA). Plaintiff Ysleta del Sur Pueblo is an Indian tribe within the meaning of the Act. *See* 25 U.S.C. § 1300g *et seq.* (Ysleta del Sur Pueblo Restoration Act). Plaintiff brought suit under § 2710(d)(7)(A)(i)[3], which provides "[t]he United States district courts shall have jurisdiction over any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe...or to conduct such negotiations in good faith."

Congress enacted IGRA following the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987), in which the Court

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[3] All statute references in this section are to Title 25, United States Code, unless otherwise indicated.

held that the delegation of criminal jurisdiction over Indian reservations to California and other states under Public Law 83-280 was not congressional authorization to civilly regulate indian gaming activity. *Cabazon*, 480 U.S. at 216. Texas is not a Public Law 83-280 state. Congress found that there were "no clear standards or regulations for the conduct of gaming on Indian lands" and enacted IGRA, in part, to provide a statutory basis to promote tribal economic development and self-sufficiency. §§ 2701(3), (4), 2702(1).

IGRA subdivides Indian gaming activities into three classes. Class I gaming includes "social games solely for prizes of minimal value" and traditional Indian games played during tribal ceremonies. § 2703(6). Class II gaming includes bingo and some derivative games. § 2703(7). Class III includes all other types of gaming activities. § 2703(8).

The three classes of gaming are subject to different regulatory schemes. Class I gaming is within the exclusive jurisdiction of the tribes. § 2710(a)(1). *See* Appendix at 2a. Class II gaming is within the jurisdiction of the tribes, subject to procedures and restrictions imposed by the statute and the National Indian Gaming Commission (NIGC). § 2710(a)(2). *See* Appendix at 2a. Class III gaming activities, the subject of this dispute, are "lawful on Indian lands only if such activities are (A) [authorized by an ordinance approved by the Chairman of the NIGC]; (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and (C) conducted in conformance with a Triba/State compact entered into by the Indian tribe and the State..." § 2710(d)(1).

Tribes wishing to engage in Class III gaming must request states to enter into negotiations to reach a Tribal/State compact governing the activities. Upon receiving a request, a state "shall negotiate in good faith" to enter into such a compact. § 2710(d)(3)(A). Tribal/State compacts may apply the tribal or state criminal and civil laws and regulations to

the gaming activities, allocate criminal and civil jurisdiction between the tribe and the state, provide for assessments by the state to defray regulatory costs, provide for taxation of the gaming by the tribe in amounts comparable to state taxes for comparable activities, provide remedies for breach of contract, and establish standards for the operation, licensing and maintenance of gaming facilities. § 2710(d)(3)(C).

Once a request to negotiate has been made, there is no mechanism for a state to decline involvement in the regulation of Class III gaming on Indian land. If a state does not respond to the request to negotiate or a compact is not concluded, the tribe can take the state to federal court under § 2710(d)(7)(A)(i). If the court finds that the state has not negotiated in good faith, it can order the state to negotiate. § 2710(d)(7)(B)(iii). It is not clear what happens if the court finds that the state has negotiated in good faith but no compact has been concluded. If the court-ordered negotiations do not produce a compact within 60 days, the court is to appoint a mediator and order the state to make its last best offer to the mediator. § 2710(d)(7)(B)(iv). The mediator chooses the most appropriate compact from that offered by the state and the tribe. The state has 60 days to consent, and if it does not, the mediator notifies the Secretary of the Interior who is then authorized to prescribe a compact in consultation with the tribe. In that process, the Secretary determines applicable state law. § 2710(d)(7)(B)(vi) and (vii).

ARGUMENT

I. THE FIFTH CIRCUIT SHOULD HAVE REACHED THE QUESTION OF WHETHER CONGRESS HAD THE POWER UNDER THE INDIAN GAMING REGULATORY ACT, 25 U.S.C. §§ 2701 *ET SEQ.* (IGRA) TO ABROGATE THE STATE'S ELEVENTH AMENDMENT IMMUNITY AND SHOULD HAVE DECIDED THAT IT DID NOT.

The State Defendants were sued pursuant to IGRA, 25 U.S.C. §§ 2701-21. The Fifth Circuit panel declined deciding whether Congress exceeded its constitutional authority by allowing states to be sued under IGRA because it determined that it should not reach constitutional issues when a case can be resolved on other grounds. 36 F.3d at 1332. The Fifth Circuit then decided that the Tribe's Restoration Act governed the right of the Tribe to gamble and determined that the Restoration Act did not abrogate the State's Eleventh Amendment immunity and dismissed the Tribe's suit.

The principle that a court should avoid deciding a constitutional question if the case can be decided on another basis is not well applied here because the Fifth Circuit decided an Eleventh Amendment question as to the Restoration Act which was not presented by the litigation while avoiding deciding the same question as it applies to IGRA, the act pursuant to which the State was sued.[4] The Fifth Circuit has required Texas to proceed through another round of litigation with another Texas tribe before having the threshold question raised by this litigation resolved.[5] Further, as delineated below, the Fifth Circuit's decision leaves unanswered serious questions impinging on the sovereignty of the State and the Tribe and the federal government's plenary power in the area of Indian Commerce.

If this Court grants the Tribe's Petition for Writ of Certiorari, it is important that it take jurisdiction of the Eleventh and Tenth Amendment issues raised by IGRA.

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[4] Admittedly, the Restoration Act presents an easier question since it does not purport to subject the State to suit.

[5] By letter dated November 21, 1994, the Kickapoo Traditional Tribe of Texas requested the State of Texas, through its Governor, to commence negotiations pursuant to IGRA § 2710(d)(3)(A) which begins a 180-day time period after which the Tribe may bring a cause of action against the State. *See* §§ 2710(d)(7)(A)(i) and (B)(1).

II. IF THE FIFTH CIRCUIT FOUND THAT CONGRESS HAD THE AUTHORITY UNDER IGRA TO ABROGATE THE ELEVENTH AMENDMENT IMMUNITY OF THE STATE, IT SHOULD HAVE DECIDED THAT THE TRIBE'S RESTORATION ACT CAN BE RECONCILED WITH IGRA BY ALLOWING THE RESTORATION ACT TO DICTATE THE SCOPE OF CLASS III GAMING AVAILABLE TO THE TRIBE WHILE FINDING THAT IGRA DICTATES THE PROCEDURE FOR REGULATING SUCH GAMING.

The State has argued that IGRA did not repeal the Restoration Act and that the Restoration Act's specific language prohibiting all gaming activities on tribal lands which are prohibited by the laws of the State controls any interpretation of IGRA. The State did not argue that IGRA had no application to the Ysleta del Sur Pueblo. In passing IGRA, Congress found that "existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands." § 2701(3). IGRA does several things that the Restoration Act does not do. Foremost, it deals with the Tribe's rights as a sovereign to engage in gaming. The laws of the State of Texas apply to activities of persons and are not easily applied to a sovereign entity like the Ysleta del Sur Pueblo. For example, it is a defense to prosecution under the State's gambling laws that the actor reasonably believed the conduct was permitted under the Bingo Enabling Act, Tex. Rev. Civ. Stat. Ann. art. 179d (Vernon Supp. 1995). Tex. Penal Code Ann. § 47.02(c)(1) (Vernon 1994). *See* Appendix at 1a. The Bingo Enabling Act requires a legalizing election in the political subdivision interested in allowing bingo. If the proposition passes, an authorized organization can conduct bingo by conforming to the requirements and restrictions of the Act. An authorized organization is defined by the Act as a religious society, a nonprofit organization whose predominate activities are for the support of medical research or treatment programs, a fraternal or veterans organization or a volunteer fire department. The

Bingo Enabling Act would be difficult to apply to an Indian tribe.

IGRA clarifies the problem created by a sovereign tribe agreeing to abide by the laws of a sovereign state[6] by dividing gaming into Class I, II and III. Bingo falls into Class II and is allowable by a Tribe if the state permits such gaming for any purpose by any person, organization or entity. Once it is determined that bingo is permitted, IGRA sets up a regulatory scheme under the supervision of the National Indian Gaming Commission.

In the more complicated area of Class III gaming, IGRA sets up a procedure to regulate such gaming activities which relies upon state involvement. Apart from the confusion created by interpretations of IGRA which allow all Class III gaming if any Class III gaming is allowed in a state, the IGRA compacting process is better suited to the regulation of gaming activities operated by a sovereign tribe than the imposition of state law.

IGRA did not repeal the Restoration Act, but the Restoration Act does not provide the regulatory scheme nor does it reflect the goals of federal Indian policy contained in IGRA. Though the Restoration Act provides the basis on which a determination can be made as to what gaming activities are appropriate for inclusion in any Tribal/State compact negotiation process between the Ysleta del Sur Pueblo and the State of Texas, without the framework provided by IGRA it would not be possible to regulate those activities since the state has no regulatory, civil or criminal jurisdiction over gaming on Tribal lands. These two federal laws should be reconciled.

It is true that IGRA presumes that there will be no extension of state jurisdiction or the application of state law to Indian land

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[6] The Fifth Circuit correctly emphasized that the provisions of § 1300g-6(a) were enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

in the absence of a Tribal/State compact. Because of the provisions of the Restoration Act, the starting point for the Ysleta del Sur Pueblo and the State of Texas may be different from other states and Tribes, but, once it is determined that a particular Class III activity is not prohibited by Texas law, the compacting process is a useful tool for determining the specifics for regulating the activity. The Restoration Act and IGRA can be harmonized by determining that the Restoration Act dictates the scope of Class III gaming available for negotiation by the Ysleta del Sur Pueblo in Texas and IGRA determines the procedure for regulating gaming activities not prohibited by Texas law.

CONCLUSION

Cross-Petitioners respectfully request that if this Court accepts Petitioner's Writ of Certiorari, it take jurisdiction and consider the questions raised herein by Cross-Petitioners.

Respectfully submitted,

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APPENDIX

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STATUTES INVOLVED

TEX. PENAL CODE ANN. § 47.02(c)(1)

§ 47.02. Gambling

. . .

(c) It is a defense to prosecution under this section that the actor reasonably believed that the conduct:

(1) was permitted under the Bingo Enabling Act (Article 179d, Vernon's Texas Civil Statutes);

25 U.S.C. § 2710(a)(1) and (a)(2)

§ 2710(a) Exclusive jurisdiction of Class I gaming activity.

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.